IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.501 of 1997

P.Natarajan .. Appellant/Defendant

vs.

S.Venkatesan .. Respondent/2nd plaintiff

Prayer: This Second appeal has been preferred against the decree and judgment dated 8.7.1994 in A.S.No.250/1993 passed by the Prl.District Judge, Salem, confirming the decree and judgment dated 28.7.1993 in O.S.No.238/1984 on the file of the Principal District Munsif, Salem.

For Appellant : Mr.P.Jagadeesan
For Respondent : Mr.T.Murugamanickam

JUDMENT

This appeal has been preferred against the decree and judgment in A.S.No.250/1993 on the file of the Court of District Judge, Salem. The defendant in O.S.No.235/1984 on the file of the Court of Principal District Munsif, Salem, is the appellant herein.

2. This appeal is against the concurrent findings of the Courts below in favour of the plaintiff in respect of the plaint 'C' schedule property, a lane, which is marked as A B C D in the rough sketch-Ex.A.4. The averments in the plaint relevant for the purpose of deciding this appeal sans irrelevant particulars in brief are as follows:-

2(a) The 1st plaintiff is the wife of late S.Sanrangapani Naidu. The said Sarangapani Naidu purchased the 'A' Schedule property under a sale deed, dated 1.9.1965. Soon after the death of Sarangapani Naidu, his heirs, viz. 1st plaintiff, his widow and his sons, the 2nd plaintiff, S.Ravendran and S.Govarthanan entered into a partition and the A Schedule property under a partition, dated 27.3.1982. The plaintiffs 1 and 2 got the entire 'B' Schedule properties for their shares in the partition and so they have become co-owners in respect of the 'B' Schedule proeprties has been described as 'A' Schedule. The 'B' Schedule fell to the share of the said Ravendran and S.Goverthanan.

2(b) The defendant is the owner of the property north of

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the property of the plaintiffs. The defendant has started demolishing his southern wall obviously with a view to put up construction by putting up pillars. The plaintiffs have no objection for the defendant for putting up any construction with his limits, without any infringing or encroaching or creating any obstruction over any portion of the property of the plaintiffs, the plaintiffs have taken the photographs of the present physical features. The defendants are not amenable for any reasonable course despite persuasion. He has been threatening the plaintiffs with dire consequences if they dare to question him in putting up his construction.

2(c) In fact, on 16.2.1983, the defendant categorically stated that the would demolish southern wall entirety including the doorway of the plaintiffs put up in the plaint 'C' Schedule property noted in the rough sketch as A B C D appended to the plaint. It will be seen that the plaint 'C' schedule property is a small lane with door way with a pit for storing cauvery water and step leading to a lane. There are windows of not less than 50 years old facing the lane of the plaintiffs, with entries and passages from the lane A B C D. The defendants have no manner of right, title or interest over any portion of A B C D mentioned in C Schedule property. The acts of the defendant, the plaintiffs gather, is calculated to obstruct light and air being the easementary right coming from the northern side to which easementary rights, the plaintiff perfected their right by prescription and prior to the their predecessors-in-title have been enjoying the easementary right of light and air coming from the nrothern side. The defendants started denying the title of the plaintiff to the plaint C Schedule property and attempting to put up pillars encroaching upon the plaint C Schedule property being A B C D lane. Hence the suit for declaration and permanent injunction to restrain him and his men from in any manner interfering with his possession in the plaint C schedule property.

3(a) The defendant in the written statement would contend that the plaintiff has to prove that the plaintiffs are the legal heirs of Sarangapani Naidu. The defendant is not aware of the partition, allotment of shares and execution and the registration of the partition deed dated 27.3.1982 alleged in the complaint. The plaintiffs are not given any right in the lane, which is described as plaint 'C' schedule property, even as per the partition deed dated 27.3.1982 or under the sale deed dated 1.9.1965. The allegation that the defendant started demolishing his southern wall for putting up pillars are incorrect.

3(b) The defendant's building is an old construction with tiled roofing. The defendant started putting up of terraced construction and superstructure in the first floor. To strengthen the existing walls the defendant has made gaps in the existing walls and erected pillars in the walls alignment. The plaintiff cannot

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have objection for the defendant's putting up the construction. None of their rights are sought to be infringed since they have no right in the property on the north of their construction. The photographs are not related to the suit property. The defendant is interested in putting up construction without any let or hindrance, but the plaintiffs are bent upon harassing the defendant while perusing his work of construction. It is false to say that the defendant is threatening the plaintiffs with dire consequences.

3(c) The lane and the door way in the lane belong to the defendant and his predecessors. The plaintiffs have no right over it. The description of property alleged to have been described in schedule of the plaint is not al all decipherable, nor intelligible. The defendant is not able to make out any thing from the writings in the description of property contained in all the three schedules. If the plaintiffs choose to give clean, legible copy of the description of the property, then the defendant would state his case regarding the property.

3(d) The door way in the lane belongs to the defendant so also the entire lane. The plaintiffs are entitled to only a portion of 15 feet in breadth and that 15 feet portion ends within their construction. The defendants father purchased the defendant's portion and the remaining portion of the property under the sale deed dated 27.10.1931. The eastern measurement for that property is 65 feet north to south. This constituted two plots each measuring 32 ½ feet on the east. After purchase, the defendant's father put up two tiled constructions one on the east and the other on the west. He left a lane for having engress and ingress on the west. He left a lane for having ingress and egress for his back portion for repairing and whitewashing the walls etc. It is an exclusive lane of Pachaiya Pillai. Subsequent to his death, there was a family settlement dated 23.6.1975 in which the defendant's portion was given to the defendant and from that time onwards the defendant is using his portion and enjoying the lane, exclusively. Pachaiya Pillai has put up doorway to prevent the stray animals and unwanted elements from resting in that lane. The defendant and his father executed a mortgage dated 25.11.1959 in favour of the Urban Cooperative Bank Limited in respect of their property in which the lane is specifically mentioned as belonging to the mortgagors.

3(e) The defendant's father put up houses immeditely after purchase dated 27.10.1931. The eves of the houses are protruding in the lane extending upto 1 ½ feet to 2 feet. The roof water is drained along with lane. Cauvery water pipeline was drawn in 1967 alongwith the lane portion. The doorways and windows of the defendant's portion were opening into the lane.

3(f) The plaintiffs' property was only a workshop. It was a cutcha construction. The construction was extending upt to the limits of the plaintiffs. Even the partition deed in the family of the plaintiffs is also clear that the plaintiffs family had no right,

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title or interest in the lane portion. It is false to say that the plaintiffs' windows and doorways were opening into the lane.

3(g) The defendant never gave out that he is going to demolish the entire southern wall including the doorway. The construction after demolition of the entire building is only a conversion of the tiled roofing into a terraced roofing and putting up of further storeys. There is no question of this defendant extending his construction including the lane. The doorway, as already stated belongs to his defendant. The pit alleged for storing Cauvery water is a make belief one. It was recently constructed in haste for creating evidence. The windows and doorways are not 50 years old. It is an unnecessary allegation to say that the defendant started denying title to the plaint 'C' schedule property. The plaintiffs have no title to the lane and they never exercised any act of ownership in respect of the property. The pillars are erected only along the wall alignment and one inch inner to the exterior wall so that there cannot be any projection exterior to the wall. The plaintiffs have no right or interest in the suit wall. They cannot have any objection for construction of the building. The drainage from the plaintiffs kitchen and the latrine is exhausting itself into the municipal drain only south of the northern wall of the plaintiff and running underground through cement pipe line. The cauvery water pipe line is also inside the plaintiff's house and running south of the plaintiffs' wall. There is nothing on the part of the defndant to grab at any portion of the property of the plaintiffs. The plaintiffs are not in possession of the lane. They never exercised any right over the lane. The telegram alleged is irrelevant for the purpose of the suit. It is only a make belief affair. There is no cause of action for the suit. The suit is not properly valued for purpose of court fee and and jurisdiction. Hence, the suit is liable to be dismissed with costs.

4. After going through the pleadings, the learned trial judge has framed three issues for trial. P.W.1 & P.W.2 were examined on the side of the plaintiff and Ex.A.1 to A.11 were marked. The defendant has examined himself as D.W.1. Ex.B.1 to B.15 were marked on the side of the defendant. A Commissioner was appointed before the trial Court, who has filed Ex.C.1-report and Ex.C.2-plan. After going through the documentary and oral evidence, the learned trial Judge has come to the conclusion that the plaintiffs are entitled to the declaration and injunction in respect of the plaint 'C' schedule property as prayed for with costs. Aggrieved by the findings of the learned trial Judge, the defendant preferred an appeal in A.S.No.250/1993 before the District Judge, Salem. The first appellate Court has also dismissed the appeal confirming the judgment of the trial Court. Hence the defendant has preferred this second appeal.

5. The substantial questions of law involved in this second

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appeal are as follows:-

i) Whether the Courts below are right in holding that the plaintiff has title to the property in the absence of any valid documentary evidence to that effect?

ii) Whether the Courts below are right in holding that the plaintiff has title over the suit lane especially when the documents relied on by the appellant viz. Ex.B.3, Ex.B.4 and Ex.B.5 categorically establish that the suit lane forms part of the appelllant's property and the appellant and his predecessors are the absolute owners of the suit land?

iii) Whether the respondent is entitled to claim title over the suit land especially when he has claimed only easementary right of light and air either by custom or by prescription and he has not pleaded title over the suit property in the plaint?

6. The points:-

6(a) The plaintiffs have filed the suit for declaration and injunction of the plaint 'C' schedule property. A perusal of the plaint 'C' schedule will go to show that there is no measurement given by the plaintiffs for the plaint 'C' schedule property. The plaint 'C' schedule property has been described as follows:-

"பி செட்டியூலில் கொடுக்கப்பட்டிருக்கும் கண்டிருக்கும் அளவுகளுக்குள் தாவா ரப்பிளானில் எ பி சி டி என்று காட்டப்பட்டுள்ளது"

The rough sketch has been marked before the trial Court as Ex.A.4. In the rough sketch to plaint 'C' schedule property the lane has been marked as A B C D. The plaintiffs have astutely not given measurement between the points A & B and points C & D to the said suit lane. But Northern measurement of the 'C' schedule property between the points B and C has given as 68 ½ feet. The measurement for D & A is not given, but the Sorthern measurement for the wall for the plaintiffs' property shown as (B) is shown as 65 ½ feet. In Ex.A.4-rough sketch, without given the exact measurement for the space between the points A & B for the suit 'C' schedule property, the plaintiffs have given the measurement for the entire eastern side wall as 31 ½ feet and has shown the western measurement for the plaintiffs' property up to the point 'C' as 30 feet. We are concerned only with the 'C' schedule property to the plaint in this case.

6(b) The plaintiffs in support of their contention have produced the sale deed in favour of the husband and the first plaintiff viz. Sarangapani Naidu dated 1.9.1965 as Ex.A.1. The property purchased under Ex.A.1 has been scheduled to the plaint as

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'A' Schedule property. The property purchased by the first plaintiff's husband under Ex.A.1 is having the following measurements:-

On the Northern side towards East-West 69 ½ feet
On the Southern side towards East-West 65 ½ feet
On the Eastern side towards North-West 31 ½ feet
On the Western side towards North-West 30 feet.

The dispute is with regard to lane which is marked as A B C D to the rough sketch. The exact measurement between the points A & B for the suit lane 'C' schedule property on the Eastern side was not mentioned in the rough sketch Ex.A.4. A Commissioner was appointed and Ex.C.2 is the plan and Ex.C.1 is the report filed by the Commissioner before the trial Court. A perusal of Ex.C.2-plan will go to show that the measurement between the points A & D is shown as 4 feet 6 inches. The Commissioner has also given the measurement for the wall on the eastern side marked as AL as 28 feet. So the Eastern measurement for the entire stretch of the plaintiff's property on the Eastern side comes to 28 feet + 4 feet 6 inches = 32 feet 6 inches. Actually the plaintiffs are entitled to 31 ½ feet alone as per Ex.A.1-sale deed on the eastern side. Further it is seen that the plaintiffs have not filed any objection to the Commissioner's report Ex.C.1 and plan Ex.C.2. So the presumption will be that the plaintiffs have no objection to the measurement given in Ex.C.2-plan for his property. Hence it is clear from the measurement available in plaint 'A' schedule property which includes plaint 'C' Schedule property that the plaintiffs are entitled only to 31 ½ feet on the Eastern side, whereas it is seen from Ex.C.2 that now the plaintiffs' claim 32 ½ feet on the Eastern side inclusive of the lane, the suit property. So the plaintiffs cannot claim their right in respect of the plaint 'A' schedule property for the one foot on the Northern side beyond his 31 ½ feet in A & D portion marked in the Commissioner's plan Ex.C.2.

6(c) Ex.A.2 is the family partition entered into between the plaintiffs' family between the first plaintiff Navanitham and her sons Ravindran and Venkatesan(2nd plaintiff) and Govardhanan. 'A' schedule to Ex.A.2 partition deed, is the 'A' Schedule property to the plaint. Under Ex.A.2 partition deed, the 'A' schedule property, which is also 'A' schedule property in the plaint was allotted to plaintiffs 1 and 2, who are parties 1 and 3 to Ex.A.2 partition deed. But there is no mention about the existence of any lane in plaint 'A' Schedule property. Even under Ex.A.1 sale deed, taken by the husband of the first plaintiff in respect of the plaint 'A' schedule property, there is no mention about the existence of any lane. Unfortunately both the Court below have failed to note the existence of the lane in plaint 'A' schedule property. According to the plaintiffs there is a lane just north of plaintiffs' property within

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'A' Schedule.

6(d) The learned counsel for the appellant relying on 2003(4) CTC 158 (R.Vellingiri and nine others Vs. Kuppathal), contended that even under Section 100 of CPC, the High Court in Second Appeal can re-appreciate evidence if Courts below had not properly appreciated evidence on record and come to incorrect conclusion and rendered finding contrary to facts. Section 100 of CPC runs as follows:-

> "1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> 2) An appeal may lie under this section from an appellate decree passed exparte.
>
> 3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> 4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> 5) The appeal shall be heard on the question as formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded,t he appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

A mere reading of the above provision of law will curtail the powers of the High Court in a Second Appeal to go into the findings regarding the facts by the Courts below. But if it is proved that the Court below have erroneously given a finding with regard to appreciation of evidence and findings in respect of a fact then it is not a bar or an embargo on the High Court to go into the question of fact also in the second appeal. The relevant observation in the above cited case runs as follows:-

> "True, Section 100 CPC, provides second appeal, provided substantial question of law is involved and mandating the Court to formulate the same, thereby directing the respondent to argue that the case does not involve such a question. *Prima facie,* if it is brought to the notice of the Court that the Courts below have not properly appreciated the evidence on contrary to the facts,

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perverse in nature, unsustainable in law, then power of the High Court is not curtailed, to reassess or to reappreciate the evidence on record, in order to render real justice to the community."

The fist appellate Court in its judgment at para 10 has categorically given a finding basing on Ex.C.2 that the portion marked as A L on the Eastern side, the plaintiffs are entitled to 28 feet and above North to the 'C' schedule the lane measurement on the Eastern side is shown as 4 ½ feet and if both the measurements are added together then it will come to 32 ½ feet but the plaintiffs are entitled to 31 ½ feet on the Eastern side as per Ex.A.1-sale deed, but has come to a wrong conclusion that it cannot be said that plaintiffs are entitled to one foot on the Eastern side. This finding of the learned first appellate Court is necessarily to be interfered with because the said findings is based contrary to the documentary evidence available in this case. That is why the plaintiffs have astutely omitted to give the measurement for 'C' schedule property to the plaint.

6(f) The learned counsel for the appellant relied on 2005 (4) CTC 573 (Phool Pata and another Vs. Vishwanath Singh and others) and contended that in a Second Appeal the High Court is competent to frame substantial questions of law and answer the same even if such question had not been formulated earlier if High Court is satisfied that case invovles such question. The exact observation in the above said dictum of the Honourable Apex Court runs as follows:-

"It was not for the defendants who were respondents before the High Court to invite any finding against them by agitating an issue which was decided in their favour by the first Appellate Court. As the findings recorded by the first Appellate Court were essentially factual, the High Court was required even otherwise to show as to how those were erroneous and which relevant material had been left out of consideration and/or which irrelevant material was taken into consideration. It has not been done. The High Court only referred to the principles on law, about which there is no dispute, without specifically pointing out which conclusions of the first Appellate Court suffered from deficiencies and in what way."

So it is clear from the above dictum that in a Second Appeal if a finding is to be given in respect of a fact which was decided by the Court below in favour of the plaintiffs, and when it came to light before this Court that the findings of the Court below are erroneous and contrary to the available documents then it is the bounden duty of the High Court to go into the question of fact also in Second Appeal and to render a finding which is necessary to correct or set right the damage done by the Courts below in rendering justice to the

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parties concerned. Unfortunately in the case on hand even though the first appellate Court has come to a definite conclusion that the plaintiffs are not entitled to more than what they are entitled to under Ex.A.1 in respect of 3 feet 6 inches towards north from point A to Ex.C.2-plan, has rendered an erroneous finding that the plaintiffs are entitled to declaration and injunction in respect of the plaint 'C' schedule property. As per Ex.A.1 plaintiffs are entitled to only 3 feet 6 inches from the point A to Ex.C.2-Commissioner's plan towards north and not 4 feet 6 inches. But as per Ex.C.2 the plaintiffs are in possession of 4 feet 6 inches on the Eastern side between the points A & D. So it is clear that the plaint is in possession of one foot over and above the extent shown in Ex.A.1 on the Eastern side of plaint 'A' schedule property.

6(g) The learned counsel for the appellant also relied on 1998(I) CTC 477 (Muthu Goundar Vs. Poosari @ Palaniappan and 4 others) and contended that if the findings of the lower appellate Court is based on surmise it can be interfered with by the High Court even under Section 100 CPC. The exact finding in the above said dictum relevant for the case on hand runs as follows:-

> "When the acceptable documents are available, it is safe to accept and rely upon them rather than accepting the oral evidence. In our case the defendants have very much relied on the oral evidence and the Courts below have also committed an error in preferring the oral evidence let in on the side of the defendants than the acceptable valid documentary evidence let in on the side of the plaintiff. In the light of what is stated above, the finding of the Courts below are perverse and contrary to the evidence on records. I also hold that the reason given by the Courts below in not considering the documentary evidence let in on the side of the plaintiff also cannot be sustained."

The second plaintiff was examined before the trial Court as P.W.1. P.W.1 would admit in the cross-examination that except Ex.A.1 and Ex.A.2 he has no other document to show his title in respect of the suit property. If it is so the plaintiffs cannot claim more than what they got under Ex.A.1 in respect of the Eastern measurement to the plaint schedule property. As per the evidence of D.W.1, the defendant herein, the defendant is also in enjoyment of the plaint 'C' schedule property. The plaintiffs must prove their title in respect of the plaint 'C' schedule property by showing the exact measurement for the same, in conformity with the measurement in his document of title viz. Ex.A.1. But the plaintiff has failed to prove the exact measurement for 'C' schedule property to establish his title over it.

6(h) To reiterate his claim that this Court can interfere

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with the findings of the facts in Second Appeal, the learned counsel for the appellant relied on 2000(I) CTC 259 (Ishwar Dass Jain (Dead) through LRs. Vs. Sohan Lal (Dead) through LRs.), wherein it has been held as follows:-

> "Now under section 100 CPC after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so.
>
> There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgment of this Court in relation to Section 100 CPC after the 1976 amendment. In *Dilbagrai Punjabi Vs. Sharad Chandra),* 1988 Suppl. SCC 710, while dealing with a Second Appeal of 1978 decided by the Madhaya Pradesh High Court on 20.8.81, LM Sharma, J (as he then was) observed that -
>
> > The Court (the first appellate Court) is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorised to set aside the finding. This is the situation in the present case".

Under such circumstances, it has become necessary for this Court to interfere with the findings of the learned first appellate Court in A.S.No.250/1993, which is perverse and against the documentary evidence. Points are answered accordingly.

7. In the result, the Second Appeal is allowed, setting aside the decree and judgment in A.S.No.250/1993 on the file of the Court of District Judge, Salem, and consequently, the suit in O.S.No.238/1984 on the file of the Court of Principal District Munsif, Salem, is dismissed with costs. Learned Counsel for the respondent would represent that he may be given liberty to file a fresh suit in respect of plaint 'C' schedule property after giving

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correct measurements for all the four sides. Such request cannot be heeded to because the plaintiff can enjoy his property as per the measurements contained in his sale deed-Ex.A.1 alone.

Sd/
Asst.Registrar

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Sub Asst.Registrar

ssv

To

1.The Prl.District Judge, Salem.
2.The Principal District Munsif, Salem.
3.The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.P.Jagadeesan, Advocate Sr 6637
+1cc to Mr.T.Murugamanickam,Advocate Sr 6582

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S.A.No.501 of 1997

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